IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 946 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? - NO

2. To be referred to the Reporter or not? - YES

3. Whether Their Lordships wish to see the fair copy of the judgement? - NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? - NO

5. Whether it is to be circulated to the Civil Judge? - NO

SAFI MOHAMMED

Versus

P.G.RAMRAKHIANI, ADDL.CHIEF SEC.TO GOVT.OF GUJARAT,HOME

Appearance:

MS SM AHUJA for Petitioner

MR CC BHALJA, AGP for Respondent No. 1

RULE SERVED for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA
Date of decision: 22/12/98

CAV COMMON JUDGEMENT

These two writ petitions by two petitioners under Articles 226 of the Constitution of India arising out of same incident, can be disposed of by a common judgment.

2. The petitioners Shafi Mohammed and Nizam Mohammed Abdulla of the two petitions had challenged the detention order dated 20th November 1997 passed by the Additional Chief Secretary to the Government of Gujarat, Home Department, under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "COFEPOSAA"). The grounds of detention are contained in Annexure.B to the writ petitions.

3. In brief, the facts are that, acting on a specific information from the Customs Officer, surveillance was kept at Ahmedabad Railway Station on 8.2.1997 when Shatabdi Express train was to arrive at Platform No.1 from Mumbai. Two passengers alighted from the said train at about 1.35 p.m. They were identified and on preliminary inquiry, they introduced themselves as Nizam Mohammed and Shafi Mohammed. Their search was taken and 81 capsule shaped packets were found and upon opening of these capsules, two notes each of 500 denomination of different foreign currencies were found, the details of which are given in the grounds of detention. The other foreign currency notes whose details are given in the grounds of detention were also found. The recovery memo was prepared. The petitioners failed to show documents showing legal possession for foreign currencies. As such, the foreign currencies were seized by the Customs Officers in presence of recovery witnesses. They suspected that the foreign currencies were to be exported from India. As such, the same were confiscated under the Customs Act. The statements of the petitioners under Section 108 of the Customs Act were recorded on 8.2.1997 itself. The extracts of the statements are contained in paragraph 2 of the grounds of detention which indicate that the petitioners confessed that they were carrying foreign currency notes for delivery at Sharjah. They also narrated about other incidents in which they were involved and how the foreign goods were brought and sold by them. Their addresses were verified and ultimately, after preliminary

interrogation, they were produced before the Additional Chief Metropolitan Magistrate, Ahmedabad in custody on 9.2.1997. Criminal cases and adjudication proceedings were initiated. The petitioners applied for bail on 23rd February 1997 in the Court of Additional Metropolitan Magistrate, Ahmedabad which was rejected on 3rd March 1997. The Sessions Judge also rejected their bail applications on 1st May 1997. During the trial, the petitioners pleaded guilty whereupon they were sentenced to undergo eight months' RI inclusive of the period already undergone during inquiry and trial and were also ordered to pay fine of Rs.2,000/-. After completion of the period of sentence, they were released on 11.10.1997. The respondents were not satisfied with the sentence awarded to the petitioners. Hence, a revision was filed in this Court on 6.10.1997 for enhancement of sentence. The said revision is reported to be pending before this Court. Before the petitioners were released on 11.10.1997, the Commissioner of Customs, Ahmedabad, in the capacity of sponsoring authority, submitted the proposal for the petitioners' detention under COFEPOSAA which was received by the detaining authority on 1.10.1997. Certain holidays intervened between 1.10.1997 to 20.11.1997. Ultimately, the detaining authority passed the impugned orders of detention against the petitioners on 20.11.1997. The petitioners have challenged these orders against them in these writ petitions on the following grounds:

(1) That the orders are punitive and not preventive in nature;

(2) That the subjective satisfaction of the detaining authority is vitiated because there was no fresh material before it ordering preventive detention;

(3) That there was inordinate and unexplained delay in passing the impugned orders;

(4) That the petitioners are Malayalees and have read upto 4th standard in Malayalam and they are unaware of Hindi and English languages, still the grounds of detention were supplied to them in English and copies of their statements under Section 108 of the Customs Act in Hindi which has taken away their valuable right of presenting effective representation and defence and thus, there has been violation of Article 22(5) of the Constitution of India;

(5) That the personal liberty of the petitioners is

affected by the impugned orders;

(6) That it was a solitary incident in which the petitioners were apprehended and on solitary incident, preventive detention was hardly justified;

4. Affidavits and counter affidavits have been read over by the learned Counsel for the petitioners and the learned APP were heard at length for three days. On the close of arguments, the learned Counsel for the petitioners informed that the period of detention under COFEPOSAA has been completed and as such, only academic exercise is to be done in deciding these writ petitions. It was also urged that this academic exercise is necessary in order to prevent initiation of proceedings under SAFEMA.

5. Coming to the first point, it has to be seen whether the impugned orders are really punitive in nature or they are preventive in nature. The distinction between punitive detention and preventive detention was drawn by the Apex Court in the case of Kubic Dariusz v. Union of India, AIR 1990 SC 605. The Apex Court observed that the object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. In cases of preventive detention, the action is anticipatory in nature. Preventive justice requires an action to be taken to prevent apprehending objectionable activities whereas in case of punitive detention, the person is detained by way of punishment after being found guilty after wrong doing where he has the fullest opportunity to defend himself. Preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society. The learned Counsel for the petitioners contended that keeping in view the material dates and events, it can be said that the detention was actually punitive in nature. She pointed out that the Customs authorities intercepted the petitioners on 8.2.1997 and after interrogation, search and seizure, they were produced before the concerned Magistrate on 9.2.1997. Their bail applications were rejected by the concerned Magistrate as well as by the Sessions Judge. The petitioners then pleaded guilty and were convicted and sentenced to undergo eight months' RI and to pay a fine of Rs.2,000/on 31st July 1997 in pursuance of the confession made by the petitioners through application dated 28th July 1997. The period of eight months RI was inclusive of the period already undergone during inquiry and trial and this

period was over on 11.10.1997. Still between 9th February 1997 to 19th November 1997, nothing was done and the detention order was passed only on 20th November 1997 with a view to keep the petitioners under detention. It was also argued that the respondents were not satisfied with the sentence awarded by the trial Magistrate and they filed revision in this Court, which is pending. In view of these events, it was argued that the detention is punitive in nature. It is, however, difficult to accept the contention simply because revision was filed that the nature of detention becomes punitive in nature. In the counter affidavit in paragraph F of the detaining authority, it is mentioned that the revision was admitted by the High Court on 3.12.1997 whereas the petitioners were already released after undergoing the term of imprisonment on 11th October 1997. As such, it cannot be said that the intention of the detaining authority was to keep the petitioners under punitive detention. I, therefore, do not find any merit in this contention and this ground cannot invalidate the impugned order.

6. The next contention has been that the subjective satisfaction of the detaining authority is vitiated inasmuch as no fresh material was placed before the detaining authority after the prejudicial activity of the petitioners and before the detention order was passed that the petitioners were likely to indulge in similar or alike objectionable activities. It was thus argued that the subjective satisfaction of the detaining authority stands vitiated. The case of Anand Prakash v. State of U.P., AIR 1990 SC 516 was referred on the point. In order to avoid the repetition under this very point, the last point that on solitary incident, preventive detention is not justified, can also be considered. In Anand Prakash (supra), the Apex Court observed that, there was solitary incident of petitioner's alleged crime and there was no previous history against the petitioner. No credible information or material on record came forward to warrant an inference that if released on bail, he would continue illegal activities. It was on these facts held that preventive detention cannot be allowed to supplant the criminal prosecution. This case to my mind is distinguishable on facts for the obvious reason that here only preventive detention was not ordered, but the prosecution was already availed of earlier though it resulted in awarding imprisonment and fine not to the satisfaction of the respondents. Adjudication proceedings were also initiated. Consequently, it cannot be said that the subjective satisfaction of the authority was vitiated or it was solitary incident. Of course, from the record, it transpires that no fresh material was

before the detaining authority between 8.2.1997 to 20.11.1997, but from the statements of the petitioners recorded under Section 108 of the Customs Act, it can be said that it was not a case of solitary incident. The petitioners had challenged the correctness of the statements recorded under Section 108 of the Act, but that challenge could not be substantiated. It could not be established that the said statements were recorded under duress or coercion. On the other hand, the counter affidavit of the detaining authority shows that the statements were voluntarily given. From the statements of the petitioners, whose extracts are given in the ground of detention, it is clear that the petitioner Shafi Mohammed had engaged himself in sale and purchase of imported foreign goods. He admitted that he is engaged in the purchase and sale of imported goods like clothes, electronic goods etc. He also admitted that his friend Abdulla was staying with him at Community Hall, at Mumbai who told Shafi Mohammed about four to five months back that he would be sending Shafi Mohammed to Sharjah at his expense and Abdulla had given foreign currency like Dirham, Riyal etc. in 500 denomination. Further details are that Shafi Mohammed took the foreign currency concealed in his luggage to Dubai (Sharjah) and delivered the same to one Hamid and thereafter went to his friend's house, namely, house of Mujib and returned back to Mumbai four or five days thereafter and brought calculators, walkman, toys etc. and sold the same earning profit of Rs.3,000/-. The third incident is also admitted that he took Rs.5,000/- from Abdulla and thereafter, after a period of three months, he again met Abdulla and entered in similar dealing with foreign currency. These admissions, therefore, clearly show that it was not a case of solitary incident. Rather, it was a case of repeated activity of the petitioners who had engaged themselves in the business of dealing in foreign currency and goods.

7. Similarly statement of Nizam Mohammed Abdulla also gives similar indication and it can hardly be said to be a case of solitary incident. If the petitioners were not prevented earlier, it does not mean that they were not engaged in such activities. Admission or confession is best evidence and from admission as well as from confession of the petitioners, it is clear that they were engaged in repeated activities of this nature and as such, the subjective satisfaction of the detaining authority on this count cannot be said to have been vitiated. In view of all this factual aspect of the case, the pronouncement of this Court in Raidu Mulu and anr. v. State of Gujarat and ors. 1985 GLH (UJ) 35

cannot help the learned Counsel for the petitioners that it was a case of solitary incident. On the other hand, on identical facts, the Apex Court in Shiv Ratan Makim v. Union of India, AIR 1986 SC 610, found from the facts stated by the detenu in his written statement that, such statement could legitimately give rise to the inference that he was a member of a smuggling syndicate and merely because only one incident of his smuggling came to light, did not mean that this was the first and only occasion on which the detenu tried to smuggle gold. In this case also, it was a solitary incident, but the Apex Court found that actually the detenu indulged himself in the business of smuggling. The facts of the case before me are also similar in nature. From the statements of the petitioners, it can be said that they were engaged in the business of smuggling foreign currency and foreign goods.

8. On facts it is true that there is no fresh material produced before the detaining authority between 9.2.1997 to 20th November 1997, but since the detaining authority has considered the entire statements of the two petitioners, he could have apprehended that, on being enlarged after facing prosecution, the petitioners may indulge in similar activities. Thus the previous incident could have given subjective satisfaction to the detaining authority that the petitioners may repeat their activities. This repetition was not possible till they were under detention either during trial or while undergoing imprisonment. After they were released on 11.10.1997, they could have repeated their activities and since it took some time to complete the preparation of sponsoring report based upon voluminous documents that the detention order was passed with slight delay. In my opinion, the subjective satisfaction of the detaining authority is not vitiated for non-production of fresh material nor it is the case of solitary incident.

9. It is also difficult to say in view of the above fact that the live-link between the objectionable activity and the detention order is snapped. In view of detention of the petitioners during the trial, this live-link cannot be said to have been snapped nor the detention order can be said to have become stale.

10. Coming to the next ground of challenge, namely, delay in passing the detention order, the relevant dates have been given in the foregoing portion of this judgment. The detaining authority in paragraph J of its counter affidavit, has explained the delay in passing the impugned order. It is, therefore, not a case where delay in passing the impugned order has not at all been

explained. The explanation of delay is that the detaining authority received the report from the sponsoring authority on 1.10.1997. It seems that because the petitioners were already undergoing imprisonment, the sponsoring authority was not in a hurry to submit the sponsoring report. The period of detention was to be over on 11.10.1997. Voluminous documents were to be examined, the correctness of addresses of the petitioners were to be physically verified and then the sponsoring report was submitted on 1.10.1997, that is, before the petitioners were actually released after completion of sentence. The detaining authority has explained the delay thereof. He felt that some more information and documents were required to be considered before passing the detention order. Vide letter dated 10.10.1997, he wrote to the Commissioner of Customs. Further information was received by the detaining authority on 17.10.1997. The Home Department called for the latest development regarding the criminal proceedings and adjudication proceedings initiated departmentally, vide letter dated 28.10.1997. The said information was received by COFEPOSA Section on 4.11.1997. Thereafter the detaining authority examined the voluminous documents and prepared notes. It was placed before the Deputy Secretary, on 11.11.1997 which cleared it on 15.11.1997. It was placed on the same day before the Additional Chief Secretary, Home Department, namely, the detaining authority. The detaining authority after considering the entire material and arriving at subjective satisfaction, passed the impugned order on 20th November 1997. It is also deposed that during the period between 1.10.1997 to 20.11.1997, there were 13 holidays; on 2nd, 5th, 11th, 12th, 19th, 25th, 26th, 30th, 31st October 1997 and 8th, 9th, and 14th November 1997. In view of this explanation of delay, it cannot be said that there was inordinate delay or unexplained delay in passing the detention order.

11. If on facts it is found that the delay has been satisfactorily explained, then on the strength of the pronouncements referred to by the learned Counsel for the petitioners, the impugned order cannot be held to be illegal. In the case of Anand Prakadh (supra), there was a delay of about two months which was not explained. Since the delay was not explained, the Apex Court held that the detention order cannot be sustained. The case of K.P.M.Basheer v. State of Karnataka, AIR 1992 SC 1352 is distinguishable on facts. No doubt, it was a case under COFEPOSAA, but the point for consideration was the effect of delay in execution of detention order. In this case, the detention order was passed, but it could not be

executed even after five months thereafter. It was on these facts held that the live and proximate link between the grounds of detention and the purpose of detention was snapped by delay and as such, the detention order was quashed. Similar were the facts in P.U.Iqbal v. Union of India, AIR 1992 SC 1900, where there was delay in execution of the detention order for about one year. There was no explanation for this delay. In the case before me, there was no delay in execution of the detention order. Similarly, the case of T.A.Abdul Rahman v. State of Kerala and ors., AIR 1990 SC 225 is also distinguishable because it was a case where there was delay in execution of the detention order. Three months' unexplained delay in execution of the order was considered to be sufficient for quashing the detention order.

12. The case of Pradeep Nilkanth Paturkar v. S.Ramamurthy and ors., AIR 1994 SC 656 is also distinguishable. In this case, the detention order was passed five months and eight days from the registration of the last case and more than four months from the date of submission of proposal. It was on these facts, the order was quashed. However, in the case before me, there has been no such inordinate or unexplained delay in passing the impugned orders after receipt of the report from the sponsoring authority. Thus, on this ground also, the orders cannot be quashed.

13. The next contention has been that the petitioners are Malayalees and they know only Malayalam language and that too, they have understanding knowledge because they have read only upto 4th Std. and they are not knowing either English or Hindi and since the grounds of detention were supplied to them in English and copies of their statements in Hindi, they were deprived of their valuable right under Article 22(5) of the Constitution of India in making effective representation in their defence. The learned Counsel for the petitioners argued strenuously that in catena of decisions, it has been observed that unless the safeguards provided under Article 22(5) of the Constitution of India are observed by the detaining authority, the order of detention cannot be maintained. According to her, these procedural safeguards are: supplying the material to the detenu and permitting the detenu reasonable opportunity of hearing which includes opportunity of making representation. She contended that supplying material to the detenu is not a mere formality. Whatever material was relied upon and referred by the detaining authority should have been supplied to the detenu and that too, in the language

which is known and understood by the detenu. There can be no dispute about the points raised by the learned Counsel for the petitioners. In Nainmal Pertap Mal Shah v. Union of India and ors., 1980 SC 2129, the Apex Court, in a case under COFEPOSAA has found that the grounds of detention were in English language whereas English was not understandable by the detenu. It was held on these facts that, Article 22(5) of the Constitution has been violated and hence, the detention order was quashed.

14. In Tsering Dolkar v. Administrator, U.T. Delhi, AIR 1987 SC 1192, the Apex Court observed that the detenu has to be informed about the grounds of detention in a language which he understands. The fact that the detenu's wife knew the language in which the grounds were framed does not satisfy the legal requirement. In the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements, it becomes difficult to sustain the order. Several other cases on the point were referred in this case. The same view was taken by the Apex Court in Ibrahim Ahmad v. State of Gujarat and ors., AIR 1982 SC 1500.

15. In my opinion, the aforesaid verdicts of the Apex Court can be applied to the facts before only when it is established that the petitioners do not know or understand either Hindi or English. Thus, on factual side, it has to be examined whether the stand of the petitioners is acceptable.

16. It may be mentioned that, initially, this ground was not taken in the writ petition. This ground was taken after the amended. Writ petition was prepared on 10.12.1997 and was filed on 11.2.1998, whereas the subsequent amendment taking this plea was incorporated on 5.11.1998. Prima facie, this plea can be said to be an afterthought because there is material on record for reaching such conclusion.

17. There is no affidavit from the petitioners on this belated amendment. They could have easily filed the affidavit that they do not know English or Hindi especially when they were already released on 11.10.1997. It is difficult to believe that the petitioners do not know either Hindi or English. In the writ petition of Shafi Mohammed, there is an affidavit dated 8.10.1998 which is in English which has been verified in English and it bears the signatures of Shafi in English language.

It is really difficult to understand that a person claiming that he does not know English had really signed in English. Similar is the case with the affidavit of Nizam Mohammed Abdulla in his writ petition. This affidavit is also dated 8.10.1998 which is in English language. It has been signed by Nizam Mohammed Abdulla in English. His signature clearly indicates that he is acquainted with English and he is not a layman who can simply sign in English language. Moreover, if he could not understand English, how he had verified the affidavit which was prepared in English is yet to be explained by him.

18. These two affidavits further show that the additional grounds T and U raising these pleas in the writ petition were canvassed which are based on legal advice. In the affidavits, it is not mentioned that what is mentioned in the proposed paragraphs T and U is based on their personal knowledge. The verification clause of these two affidavits is equally defective and confusing. Thus it seems that this amendment was incorporated on legal advice and the petitioners know and understand English.

19. So far as the petitioners' knowledge in Hindi is concerned, it is again difficult, for the reasons given above, to believe that they do not know Hindi or they cannot understand Hindi. There are statements under Section 108 of the Customs Act recorded in Hindi. These statements were read over to them and they signed the said statements. They made unsuccessful attempt to challenge the said statements. Eve the detaining authority was not satisfied with their stand on the point. Moreover, from the counter affidavits of Shri J.R.Rajput, Under Secretary, Home Department, Govt. of Gujarat, another important fact comes to light. He has mentioned and deposed that the petitioners faced trial. This fact is not disputed. It is further mentioned that the petitioners do not know Gujarati. The witnesses in Criminal Case No.114 of 1997 filed by the Customs Inspectors gave their statements in Gujarati. The Additional Chief Metropolitan Magistrate, in his judgment mentioned that since the accused do not understand Gujarati, the witnesses examined by the prosecution had given their statements in Hindi and the translation thereafter is written in Gujarati. It, therefore, means that double record of the statement of witnesses in the aforesaid Criminal Case was maintained by the learned Magistrate in Gujarati as well as in Hindi. Admittedly, the petitioners do not know Gujarati. They never objected that the statements of witnesses should not be

recorded in Hindi because they do not understand Hindi. Thus, there are strong circumstances indicating that the petitioners know and understand Hindi.

20. It is further deposed in these affidavits that all the States in India had adopted the national policy of three languages, namely, English, Hindi and vernacular. Consequently, it is difficult to presume that English and Hindi are not known or understood by the petitioners. Even illiterate citizens of India can speak and understand Hindi as it is a national language. In these affidavits, it is further deposed that Hindi version of the order of detention, grounds of detention and sets of documents were provided to the petitioners and the same were explained in Malayalam. The learned Counsel for the petitioners argued that if the petitioners knew Hindi, there was no need to explain their statements in Malayalam. A mention to this effect has been made in the statements of the petitioners recorded under Section 108 of the Customs Act that their statements were also explained in Malayalam, but that may be to give a fair chance to the petitioners to fully understand what was their statements recorded under Section 108 of the Customs Act. It cannot be said because of this latitude that a presumption should be made that the petitioners do not know Hindi.

21. Thus on facts it is established that the petitioners know as well as understand Hindi as well as English. If this is so, then it cannot be said that the safeguards envisaged under Article 22(5) of the Constitution of India were not observed or that in any manner the provisions of Article 22(5) of the Constitution of India were violated.

22. The last point has been that, by the impugned order, the personal liberty of the petitioners has been affected. However, to my mind, on this ground, no detention order can be quashed. Whenever an order in the nature of preventive detention is passed, it is likely to affect the personal liberty of such person or citizen. If on the other hand, the safeguards contemplated under Article 22(5) of the Constitution of India are not observed, then only it can be said that there has been deprivation of liberty of a citizen contrary to the provisions of the Constitution. It is not every deprivation of liberty which is in accordance with the Constitutional provisions that it can be said to be illegal and on this ground, the order of detention cannot be quashed.

23. No other point was pressed before me by the learned Counsel for the petitioners. In the result, I do not find any merit and substance in these two writ petitions. These two writ petitions are accordingly dismissed.

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